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# In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 944

DANIEL J. SHIELDS, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES

### OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 75) has not been reported.

### JURISDICTION

The judgment sought to be reviewed was entered January 11, 1927 (R. 84), and rehearing denied February 14, 1927 (R. 100). The petition for a writ of certiorari was filed February 28, 1927. Jurisdiction to issue the writ is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936.

STATEMENT

Petitioner was tried with others upon an indictment charging conspiracy to violate, as well as various violations of, the National Prohibition Act. (R. 10–23.) The case was submitted to the jury on Friday afternoon, February 12, 1926. Before the court convened on Saturday morning, February 13, 1926, the jury still being out, counsel for the defendants and the Assistant United States Attorney in charge of the prosecution visited the trial judge in chambers and requested that the jury be held in deliberation until they should agree upon a verdict. (R. 98–99.) Shortly after the opening of court at 10.00 o'clock that morning, the jury returned for additional instructions on the subject of entrapment, and having received the same, retired for further deliberation. About 2.30 o'clock that afternoon the jury again returned to court, in the absence of petitioner and his counsel, and reported that they could not agree. (R. 96, 99.) What instructions, if any, were then given the jury the record does not disclose. It appears that the jury again retired to deliberate, and between 4.30 and 5.00 o'clock p. m. sent to the Judge in chambers the following written communication (R. 26, 54):

> We, the jury, find the defendants John G. Emmerling, Charles Lynch not guilty on all counts, E. W. Hardison, J. E. Hunter and J. L. Simler guilty on all counts. Daniel J.

Shields, Harry Widman, J. M. Gastman unable to agree.

Signed, E. B. MILLIGAN,
*Foreman.*

The Judge sent back the following written reply (R. 26, 54):

> The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.
>
> F. P. SCHOONMAKER,
> *Judge.*

Shortly thereafter the jury returned the following verdict (R. 26):

> We, the jury find the defendants John G. Emmerling, Charles Lynch, not guilty on all counts. E. W. Hardison, J. L. Simler, J. E. Hunter guilty on all four counts. Daniel J. Shields, Harry Widman, J. M. Gastman guilty on first count and recommended to mercy of court. Not guilty on 2nd, 3rd and 4th counts, this 13th day of February, 1926.
>
> E. B. MILLIGAN,
> *Foreman.*

Upon this verdict the court rendered its judgment wherein the petitioner Shields was sentenced to pay a fine of $2,000 and to be imprisoned in jail for one year. (R. 65.) Shields thereafter filed in the court a petition alleging that until April 21, 1926, neither he nor his counsel had any knowledge of the tentative verdict sent by the jury to the Judge in chambers, or of the reply thereto by the Judge, and praying that he be allowed an exception

to the action of the Judge in sending said reply. (R. 54, 55.) The court refused to grant the petition for the reason, as stated by it (R. 57):

> * * * that counsel for the defendant, Daniel J. Shields, requested the court to hold the jury in deliberation until they should agree upon a verdict, and therefore when the court received the communication from the jury, it was returned with the instructions complained of, although it is true that the defendant's counsel was not present when the communication was handed to the court from the jury.
>
> (Sgd.) PER CURIAM
>
> S.

An exception was allowed, however, to the foregoing refusal to grant an exception, the record reciting in this respect (R. 57):

> *Eo die* an exception to the above refusal to grant an exception is hereby noted to the defendant, Daniel J. Shields.
>
> [SEAL.] F. P. SCHOONMAKER,
>
> *Judge.*

Shields thereupon took the case to the Circuit Court of Appeals upon writ of error, assigning among other alleged errors, the action of the District Court in sending the aforesaid communication to the jury and the refusal of the court to grant an exception to that action. (R. 67–71.) Overruling these contentions, the Circuit Court of Appeals, in an opinion affirming the judgment, said (R. 83):

> The justified reliance of Court on the request of counsel; avoidance of abortive mistrials and the timely administration of a court's work, based on the verdict of a jury which had evidence to support it, all unite in making the case one where with one breath a court cannot be asked by counsel to take a step in a case and later be convicted of error because it has complied with such request, for as is said in *17 Corpus Juris* 373–4, "A defendant in a criminal case cannot complain of error which he himself has invited."

As grounds for the allowance of a writ of certiorari, petitioner urges: (1) That the request joined in by counsel for the defendants, that the jury be held in deliberation until they had reached a verdict, could not properly be construed as a consent that the court might communicate with the jury out of court and in the absence of the defendants and their counsel; (2) that the action of the District Court in thus communicating with the jury was a denial to petitioner of due process of law; (3) that the judgment of the Circuit Court of Appeals upholding that action is in conflict with the decision of this Court in *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76; (4) that the instruction in said communication to the jury, that it "will have to find also whether Shields, Widman and Gastman are guilty or not guilty," was additionally erroneous because in violation of Section 1036 of the Revised Statutes, which authorizes a

jury to bring in a verdict as to those of the defendants regarding whom they are agreed, and declares that the case as to the other defendants may be tried by another jury; (5) that in this respect the instruction of the District Court runs counter to the decision of this Court in *Bucklin* v. *United States,* 159 U. S. 682; and (6) that the direction to the jury to bring in a verdict of guilty or not guilty as to the three defendants named had the effect of coercing the jury into rendering a verdict which they were plainly reluctant to return.

After a careful study of the record in this case the Government is unable to find any satisfactory ground for opposing the petition for a writ of certiorari. No brief in opposition will therefore be filed, and if the writ issues the Government will submit the case without being heard further.

Respectfully submitted.

WILLIAM D. MITCHELL,
*Solicitor General.*

MABEL WALKER WILLEBRANDT,
*Assistant Attorney General.*

JOHN J. BYRNE,
*Attorney.*

MARCH, 1926.

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